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No. 02-1507

In The
Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION
Petitioners,

v.

TOWN OF FREMONT
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Hampshire

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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May 16, 2003

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MOTION FOR LEAVE TO FILE AS *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Defenders of Property Rights ("Defenders") requests leave to file the accompanying *amicus curiae* brief in support of the Petition for Writ of Certiorari. Petitioners Henry Torromeo and MDR Corporation have consented to the filing of this brief; Respondent Town of Fremont has not.

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the Framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights.

This case concerns an alleged violation of the Just Compensation clause of the Fifth Amendment in the context of a temporary taking of private property. Defenders believes that the guarantee of the Fifth Amendment must be uniform in all states and, further, that the rule adopted by the Supreme Court of New Hampshire and some other state courts is utterly inconsistent with that guarantee. Allowing local governments to avoid the constitutionally required remedy of just compensation for an ordinance that temporarily deprives a property owner of the property's use and value, simply based on a finding that the ordinance was invalid from the beginning, undercuts a fundamental constitutional right of private property owners and frustrates the intent of the Fifth Amendment. Defenders will provide additional information on these issues that will assist this Court in deciding if it should hear this case.

Accordingly, Defenders respectfully moves that this Court grant its motion to file the accompanying *amicus curiae* brief in support of the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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QUESTION PRESENTED

Amicus curiae will address the following issue presented for review:

When a local government enacts a growth management ordinance in the general scope of its authority that deprives a property owner temporarily of economic use of his property, can the local government avoid paying Just Compensation under the Fifth Amendment based on a finding that the growth ordinance was invalid from the start due to a procedural defect in its enactment?

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BRIEF IN SUPPORT OF PETITIONERS*

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of Northern*

Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

Henry Torromeo wanted to develop a 27-lot residential subdivision called Mason's Corner in Fremont, New Hampshire. MDR Corporation wanted to do the same with a 14-lot subdivision in Fremont it owned in Fremont called Glidden Hills Estates. In September 1999, the Town of Fremont denied Torromeo and MDR building permits because of a local growth control ordinance, leaving petitioners with no use of their land. By that time, Torromeo

and MDR had collectively sunk $1 million into their subdivision roads. They could not build in the subdivision, had nothing of value to sell, and could not relocate to develop elsewhere, their capital being sunk in Fremont.

Torromeo and MDR filed separate suits for injunctive relief to compel issuance of the building permits. The Superior Court ordered issuance of the permits in December 1999, ruling that the growth control ordinance under which the permits were denied was invalid *ab initio* because the Town had not adopted a capital improvement program, the statutory prerequisite to a growth control ordinance. The Town issued the permits in February 2000.

Torromeo and MDR received no just compensation for the six-month period during which they could make no beneficial or productive use of their land. They filed separate suits in Superior Court to recover just compensation under the state and federal Constitutions. The Superior Court awarded Torromeo and MDR compensation for the carrying costs and fair rental value of the undeveloped lots, ruling that

petitioners did not have to prove the unconstitutionality of the growth control ordinance to recover just compensation, as the Town had argued at the damages phase. The Town appealed to the Supreme Court of New Hampshire.

The Supreme Court of New Hampshire reversed the award of just compensation, finding that the proper remedies for this "mere municipal error" were limited to invalidation of the ordinance and issuance of the previously denied building permits, despite the economic loss to petitioners. Torromeo and MDR petition this Court to review the decision of the New Hampshire Supreme Court.

REASONS FOR GRANTING THE PETITION

I. This Court's Intervention Is Needed to Ensure That States Consistently Interpret the Fifth Amendment Guarantee of Just Compensation for Temporary Takings

Sixteen years ago, this Court reversed the holding of the California Supreme Court that "when an ordinance . . . deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly

mandamus." *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 308 (1987). The *First English* Court held that:

> 'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation . . . The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed. Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment[1] requires that the government pay the landowner for the value of the use of the land during this period.

482 U.S. 304, 318-319. The *First English* Court was clear as to what remedy the Constitution required for temporary regulatory takings--just compensation. *See* 482 U.S. 304, 320 ("Invalidation of the ordinance . . . , though converting the taking into a temporary one, is not a sufficient remedy to meet the demands of the Just Compensation Clause").

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[1] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

Despite the *First English* decision, however, the highest courts of many states have reached diametrically opposite conclusions on whether an authorized but invalid action of local government constitutes a taking for which the Fifth Amendment guarantees just compensation. Despite the clear holding of this court that temporary takings are compensable, many state courts appear confused about whether all such takings are compensable.

Connecticut, Florida, Louisiana, Mississippi, Massachusetts, Nebraska, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, and Wisconsin have required compensation for all temporary takings, including those worked by invalid regulations. *See, e.g., Cumberland Farms, Inc. v. Town of Groton*, 719 A.2d 465, 474 (Conn. 1998) (town's improper denial of variance did not preclude Just Compensation claim); *Tampa-Hillsborough County Expressway v. Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994) (as-applied takings challenges to a Florida map reservation statute were unaffected by finding that statute

violated Due Process Clause); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269 (Mass. 1992) (regulatory takings challenge to rent control ordinance could go forward regardless of previous ruling that ordinance was ultra vires); *Sintra, Inc. v. City of Seattle,* 935 P.2d 555 (Wash. 1997); *Eberle v. Dane County Bd. Of Adjustment*, 595 S.W.2d 730 (Wisc. 1999) (developer's temporary takings action under state constitution was not barred by the fact that delay resulted from board's improper denial of zoning variance).

For example, the Nebraska Supreme Court held that the unenforceability of a zoning ordinance and the arbitrariness and capriciousness of the permit denials issued thereunder did not relieve the city of its duty to pay compensation to the aggrieved property owner. *See Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994). The New York Court of Appeals held that an invalid rent control exemption that caused a temporary taking did not preclude an award of just compensation. *See 520 E. 81st Street Associates v. State*, 780 N.E.2d 518

(N.Y. 2002). The Ohio Supreme Court agreed that the invalidity of a rezoning did not bar the award of just compensation to the property owners afflicted during the rezoning's effective period. *See State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002). Pennsylvania likewise agreed that "in a takings inquiry, however, the question is whether the governmental action effectively deprived the landowner of all beneficial use of his property, regardless of whether the action in question was a valid exercise of governmental power." *See Miller & Sons Paving, Inc. v. Plumstead Township,* 717 A.2d 483, 486 (Pa. 1998).

The Supreme Court of South Dakota has neglected to explore any remedy for a temporary taking other than just compensation, which, it held, formed the outer parameters of the available remedy for a temporary taking. *See SDDS, Inc. v. State of South Dakota*, 650 N.W.2d 1, 10-11 (S.D. 2002) ("states should be free to experiment in the implementation of this rule, provided

that their chosen procedures and remedies comport with the fundamental constitutional command [of just compensation]"). Washington allowed just compensation for a temporary taking caused by a housing ordinance struck down on substantive due process grounds. *See Sintra, Inc. v. City of Seattle,* 935 P.2d 555 (Wash. 1997).

The Superior Court of Rhode Island held recently that a landowner that has "successfully freed its land" from the state's Department of Environmental Management's demand that he submit a new development permit application via invalidation is entitled to just compensation. *See Woodland Manor, III Assocs., L.P. v. Reisma,* 2003 R.I. Super. LEXIS 35, 46 (R. I. Super. Feb. 24, 2003). In so holding, that court relied on First English's holding that invalidation "was not a sufficient remedy to meet the demands of the Just Compensation clause." *See id.*

A few states have codified the holding in *First English* to ensure that state agencies and political subdivisions pay just compensation for temporary takings of

private property after the regulation is found invalid. Louisiana authorizes the owner of agricultural or forest land to bring an action against a state or local government agency if a rule or regulation has reduced the value of that land by twenty percent or more. Louisiana law also mandates that, even "if such rule or regulation is rescinded or repealed," "the governmental entity shall be liable for damages sustained by the property owner to his affected property which were caused by the application of the rescinded or repealed rule or regulation." *See* LA. REV. STAT. ANN. § 3:3610 (2003).

Similarly, Mississippi gives state governmental entities the option of rescinding rules or regulations that reduce the value of agricultural or forest land by more than forty percent, but still requires them to pay the aggrieved property owner if they opt to rescind the offending regulation. *See* MISS. CODE ANN. § 49-33-9 (2003) ("Subsequent repeal of the action by the state after a decision

has become final shall not entitle the state to refuse payment . . .").

The states interpreting First English in this manner focus on the property owner's resulting loss. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 652 (1980) (Brennan, J. dissent) ("From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it").

Other states have restricted the scope of protection for landowners afflicted by temporary takings, removing the focus from the property owner's loss by barring a takings remedy where landowners successfully procured the invalidation of the offending regulation. California, New Jersey, Texas, and Vermont have precluded takings claims based on authorized but invalid regulation. *See* John D. Echevarria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1057 (2000). These cases reject temporary Just Compensation

claims on the grounds that only lawful and valid government action gives rise to takings liability. *See Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188 (Calif. 1998); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 344 (N.J. 2001), *cert. denied*, 535 U.S. 1077 (2002); *Chioffi v. City of Winooski*, 676 A.2d 786 (Vt. 1996) (city's erroneous denial of variance application barred Just Compensation claim). *See also* TEX. GOV'T CODE §2007.023 (2002).

The Supreme Court of New Jersey has held that just compensation was not required in the case of "an invalid ordinance in which government went beyond the scope of its zoning power" in working a taking. *See Pheasant Bridge Corp.*, 777 A.2d at 344. That court held that interim monetary damages were not constitutionally required for "regulatory delay in securing a change in, or variance from, a zoning ordinance and delay occasioned by resort to judicial processes to challenge application of a zoning ordinance to one's property." *See id.* California also excludes just

compensation as a remedy for erroneous government conduct that temporarily deprives a property owner of economic and beneficial use of his property. *See, e.g., Landgate*, 953 P.2d at 1995 ("legally erroneous decision of a government agency" is merely a "regulatory mistake" that cannot be compensated as a taking). Vermont likewise held the reversal of an improper denial of a building permit to be mere "regulatory delay" barring a temporary takings claim. *See Chioffi*, 676 A.2d at 788.

Texas permits a state agency to elect paying compensation to property owners whose property value is reduced by twenty-five percent or more. *See* TEX. GOV'T CODE §2007.023 (2002). That is, rescinding the action remains a viable substitute under Texas law for just compensation.

This is not mere inconsistency—it is denial of constitutional guarantees. The role of this court is to declare what the constitution means, and to provide this guidance to the state courts. *See, e.g., Eldred v. Ashcroft,* 123 S. Ct. 769,

801 (2002); *United States v. Morrison*, 529 U.S. 598, 616 (1999); *Marbury v. Madison,* 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

State courts interpreting *First English* to exclude authorized but invalid regulation from the ambit of temporary takings liability add another layer of confusion to takings jurisprudence. In cases against the federal government, the courts have generally rejected the argument that an invalid statute or regulation cannot give rise to a taking.

Property owners who suffer regulatory takings at the hands of the federal government can hold government liable for actions that are authorized but invalid on other grounds. A Just Compensation claim against the federal government is established "as long as the government's action was authorized, even if the government's action was subject to legal challenge on some other ground." *See Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001). *See also Del Rio Drilling Programs, Inc. v. United* States, 146

F.3d 1358, 1362 (Fed. Cir. 1998); *Pi Electronics Corp. v. United States,* 2003 U.S. Claims LEXIS 26, 32 (Ct. Fed. Cl. 2003). Consequently, neither good faith mistake on the part of the federal government, see *Del-Rio Drilling*, 146 F.3d at 1363, nor negligence, *see Boling v. United States*, 41 Fed. Cl. 674, 679 (1998), *rev'd on other grounds*, 220 F.3d 1365 (Fed. Cir. 2000), bars a Just Compensation claim against the federal government for otherwise authorized action.

The Fifth Amendment guarantee of Just Compensation is a federal constitutional right that binds the states, *see Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1897), and must be interpreted consistently by them. *See, e.g., Mapp v. Ohio,* 367 U.S. 643, 656 (1961). Imagine the public outcry if interpretations of free exercise of religion, freedom of speech, freedom of peaceable assembly, and the right against compelled self-incrimination varied from state to state. The Constitution requires the same consistency with respect to the Fifth Amendment right to Just Compensation, no "poor relation" among constitutional guarantees. *See*

Dolan v. City of Tigard, 512 U.S. 374, 392 (1994). This Court's intervention is needed to ensure that this federal constitutional provision receives the same interpretation at both the state and federal level.

II. Permitting Invalidation as a Substitute Remedy for Just Compensation Invites the Risk of Regulatory Gamesmanship

The economic concerns of property owners at stake in this case also demand this Court's intervention. The Just Compensation requirement ensures that the burden of regulation that deprives property of economic value falls on the public rather than on the property owner. Allowing local governments to avoid paying just compensation for a regulatory taking based on the initial invalidity of the offending regulation invites abuse and gamesmanship on the part of state and local governments. The property owner who succeeds in having an authorized but otherwise invalid regulation struck down leaves the government free to return

to the regulatory drawing board. *See* Douglas Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 IND. L.J. 45, 51 (1982). As one commentator has pointed out, invalidation as a substitute remedy leaves the property owner at a perpetual disadvantage:

> You have obtained a decision that the single-family classification of your client's property is unreasonable. Your client wants to use the property for commercial purposes. The community immediately rezones the property to a Duplex Zone and invites you to spend another two years and thousands of dollars litigating that classification.

RICHARD BABCOCK, THE ZONING GAME 13 (1966).

Under an invalidation-only regime, governments can, at no cost, simply enact defective land use regulation after defective land use regulation, knowing that they will never be liable for just compensation. Property owners, on the other hand, bear the cost of the regulation and the cost of challenging the regulation.

Because it properly allocates the burdens of government action in the property context, the Just Compensation requirement serves as the only means to

discourage this regulatory abuse and gamesmanship. *See San Diego Gas & Electric Co.*, 450 U.S. at 656 (Brennan, J. dissent) ("[M]ere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole"). Just compensation, not invalidation, reallocates the burden of regulation back to the public, where, in "all fairness and justice," it "should be borne." *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to grant the Petition for Writ of Certiorari.

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